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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1254

DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AND STANLEY HARMON,

Petitioners,

vs.

MITCHELL B. GOLDBERG, THE CITY OF CINCINNATI, RICHARD L. KRABACH, CITY MANAGER, JAMES FLICK, DIRECTOR, DEPARTMENT OF FINANCE, WILLIAM H. BLAES, TREASURER, AND WILLIAM McCLAIN, CITY SOLICITOR,

Respondents.

BRIEF OF RESPONDENT MITCHELL B. GOLDBERG IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

INTRODUCTION

Petitioners show none of the bases for the exercise of certiorari jurisdiction by this Court. All that is claimed is alleged error below. Moreover, this particular case is moot and besides Petitioners have already pending another case in the United States District Court raising the same questions attempted to be raised here.

COUNTER STATEMENT OF FACTS

In January 1970, employees of the City of Cincinnati went on strike and continued to strike for many weeks to coerce the City into paying wage increases and other benefits in spite of an existing court injunction enjoining such strike. The City, after being brought to its knees (in the words of the union's chief official) by accumulating garbage, lack of street repairs, and lack of ice and snow control, inoperability of its sewarge treatment plant and damage to its water works, and other dangers to public health and safety, finally surrendered to the strikers, agreed to their demands, and passed enabling legislation to pay the increased wages and other benefits.

Respondent Mitchell B. Goldberg as a taxpayer filed suit in the Common Pleas Court of Hamilton County against the City of Cincinnati and its chief officers to enjoin the payment of any increase in wages and benefits to employees of the City which the City was coerced into paying because of the strike. Respondent contended that the strike and resulting pay increases were illegal under the anti-public employees strike act in Ohio, the Ferguson Act, Chapter 4117 of the Ohio Revised Code; that the strike was in contempt of an existing, unreversed, final permanent court injunction enjoining such strike; that such illegal strike and contempt of court was used successfully to coerce the City into agreeing to pay the increase and other benefits in question; that in order to uphold the law and respect for court orders, the striking employees should not be permitted to be rewarded by retaining the benefits and fruits of such violation of law and contempt of court, and that the Ferguson Act expressly forbade any increase to such strikers for at least one year from the end of their strike. Respondent expressly waived allowance of attorney's fees if successful.

The petitioners here, as proposed intervenors, were a council of the unions involved and one of its officers and were both defendants in the earlier injunction suit who had violated the permanent injunction above referred to, and moved to intervene as defendants in the common pleas court below. That court overruled such motion, but permitted them to appear as amici curiae. Also they sat at the counsel table for the defense, and counsel for the City cooperated closely with their counsel. The Common Pleas court although finding:

> ". . . there was a strike of the city employees, that a strike of the city employees with or without the Ferguson Act was unlawful, that the purpose of the strike was to coerce the city officials to raise their wages and obtain other benefits,"

nevertheless further found that the city did not "invoke" the Ferguson Act and dismissed respondent's petition.

Thus, although the common pleas court did not grant petitioners' motion to intervene, it decided the case on its merits in their favor, so that the denial of their motion could not have been prejudcial. Petitioners appealed the common pleas court's denial of their motion to intervene to the Court of Appeals of Hamilton County, which affirmed that order of the court of common pleas. From the Court of Appeals' affirmance, petitioners appealed to the Ohio Supreme Court by motion to certify the case. The Ohio Supreme Court denied the appeal.

When respondent appealed the case on the merits to the state Court of Appeals, where under Ohio law, the Court of Appeals heard the case on a trial de novo, the Petitioners filed a motion to intervene in the trial de novo in that court. That court likewise permitted them to appear as amici curiae, to sit at the counsel table, make oral argument, and instructed the City to incorporate in the

City's brief any arguments which Petitioners wished to make, which the City did. However, the Court of Appeals denied their motion to intervene as formal parties. That order of the Court of Appeals, however, has *not* been appealed to any higher court.

On the trial de novo of respondent taxpayer's suit in the Court of Appeals, the court ruled in respondent's favor and enjoined the City from paying increases to those city employees who were on strike for a period of one year from the strike, but did not determine which employees were on strike. The City appealed that decision to the Ohio Supreme Court which recently heard arguments on the merits. Petitioners once more were permitted to appear as amici curiae and file a brief. They again were permitted to sit at counsel table and were permitted to and did participate in oral argument.

It thus appears that if the writ of certiorari were granted by this Court the only question before this Court would be whether the Court of Appeals was correct in affirming the order of the Common Pleas Court denying the motion to intervene in the latter court which decided the merits of the case favorably to petitioners. The denial by the Court of Appeals of a similar motion to intervene in the trial de novo in that court was never appealed and is *not* before this Court.

ARGUMENT

THERE CAN BE NO ERROR PREDICATED ON THE AFFIRMANCE OF A DENIAL OF A MOTION TO INTERVENE IN THE TRIAL COURT WHERE THE TRIAL COURT DECIDES THE CASE ON THE MERITS IN FAVOR OF THE PARTY OR PARTIES WHOSE MOTION TO INTERVENE WAS DENIED. THE FAVORABLE DECISION ON THE MERITS IN SUCH A CASE MAKES THE MOTION TO INTERVENE MOOT.

Since the Common Pleas Court in this case dismissed respondent's petition and entered final judgment against him on the merits, it thereby gave the proposed intervenors the most favorable possible judgment in their favor on the merits. Having achieved the most favorable end result possible had their motion to intervene been granted, its denial could not have been prejudicial and the entire question of their claimed right to intervene was rendered moot.

The affirmance by the Court of Appeals of the denial of the motion to intervene in the Common Pleas Court is the only question sought to be appealed to this Court. Petitioners have erroneously included in the Appendix to their brief the Entry of the Court of Appeals denying their motion for leave to intervene in that Court. That decision, however, has never been appealed to any court and the time for appeal from that order has long expired.

Since the denial of the motion to intervene in the Common Pleas Court was not prejudicial and had become moot, the affirmance by the Court of Appeals could not have been erroneous, as courts do not rule on moot questions. *State of Ohio* v. *United States*, 292 U.S. 498 (1934); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920); *Oil Workers Unions* v. *Missouri*, 361 U.S. 363 (1960).

IN A TAXPAYER'S ACTION TO RESTRAIN ILLEGAL PAYMENT OF CITY FUNDS, IT IS NOT REVERSIBLE ERROR TO DENY INTERVENTION TO PROPOSED RECIPIENTS OF SUCH FUNDS WHERE PROPOSED INTERVENORS CANNOT SHOW THEIR INTERESTS ARE NOT ADEQUATELY REPRESENTED, AND PARTICULARLY WHERE THEY SHOW NO PREJUDICE.

Rule 24 (A) of the new Ohio Rules of Civil Procedure which is virtually identical with Rule 24 (a) F.R. Civ. P. summarizes the rules for intervention as of right as decided by the cases. That rule provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest *unless the applicant's interest is adequately represented by existing parties.* (emphasis added)

The proceeding on the merits was an adversary proceeding in every respect. The City vigorously opposed the respondent taxpayer's contention and did everything possible to keep him from prevailing. Indeed, the City won in the Common Pleas Court, the affirmance of whose order denying intervention is what is being appealed to this Court in this case. Besides, petitioners were accepted as amici curiae in all state courts, sat at counsel table, closely conferred with counsel for the City, were permitted to make oral arguments, join in briefs, and filed a separate brief in the Ohio Supreme Court. Indeed, the City not only appealed the Court of Appeals' decision on the merits

in favor of respondent, but persuaded the Court of Appeals to make its decision operate prospectively only so that striking employees were permitted to keep the illegal increase paid to them up to the date of the Court of Appeals Entry, which was almost six months after the strike began. Also the City is accumulating and investing at interest in a separate fund the pay increase enjoined by the Court of Appeals so as to have the same, including the interest, available to the strikers should the City be successful in having the Court of Appeals reversed. Hence, it cannot be said that interests of the petitioners were not properly protected. Since the petitioners' interest was and is adequately represented by the City, they could not intervene as a matter of right. See *Blocker* v. *Bd. of Education of Manhasset, New York*, 229 F. Supp. 714, 715 (E.D. N.Y. 1964); *Allegheny Corp.* v. *Kirby*, 344 F. 2d 571 (2 Cir. 1965); *Wilson* v. *Illinois Central R.R. Co.*, 21 F.R.D. 588 (W.D. Ill. 1957).

Where a taxpayer seeks to enjoin alleged illegal expenditures of public funds from a public entity seeking to expend them, if everyone who had an interest in such expenditure could intervene as a matter of right, there would be nothing but hopeless confusion. See *Crosley Steam Gage and Valve Co.* v. *Manning, Maxwell and Moore, Inc.*, 51 F. Supp. 972, 973 (D.C. Mass. 1943).

The cases cited by opposing counsel are not appropos here since there were special reasons in each for allowing intervention which are not present here. In *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio Railroad Co.*, 331 U.S. 519, the union was given an absolute right to intervene under the federal statute, Section 17 (11) of the Interstate Commerce Act. The Court found that this right was absolute within the meaning of Rule 24 (a) of the F.R. Civ. P. It is not claimed in this case, nor could

it be, that any statute permits intervention as a matter of right. In *International Union, United Automobile Workers* v. *Scofield*, 382 U.S. 205, the Court limited its holding as to the right of intervention solely to review proceedings of the National Labor Relations Board, 382 U.S. at 210.

A case substantially identical with the case at bar, however, was decided by the Supreme Court of Pennsylvania. In *Legman* v. *School District of the City of Scranton*, 432 Pa. 342, 247 A. 2d 566 (Sup. Ct. Pa. 1968), a taxpayer sought to enjoin the school district from paying increased salaries to striking teachers since to do so would violate 43 P.S. 215.1 et seq. of the Pennsylvania Statutes (Pennsylvania's equivalent of the Ferguson Act) which prohibits striking public employees from receiving an increase in wages for three years after the strike. Appellants in the *Legman* case contended that reversible error was committed in the lower courts because the taxpayer failed to join striking teachers as indispensable parties to the action. The tests in equity as to whether certain parties are indispensable are analogous to the tests which establish intervention as a matter of right. The Court stated at 247 A. 2d 569:

> "But the disposition of this controversy will not affect the interest of any individual employee of the school district. It is true that, if the injunction is obtained, the school board will withhold raises from employees who it determines were "on strike". However, such action by the school board will hardly be conclusive of the rights of these teachers since Section 5 of the act provides a procedure by which each affected teacher will be able to challenge the school board's determination. Thus all that will be adjudicated in the present litigation is the propriety of the school board paying raises to all teachers without determining whether any of such employees went "on

> strike". *In such a controversy the individual teachers are clearly not indispensable* (emphasis added)."

Similarly, in the case at bar, the taxpayer challenged the illegal payment of funds by the City of Cincinnati to striking employees. The court did not decide which individual employees were on strike – this determination was left with the City. The individual employees were not parties to the main case and are not individually bound by that decision.

While there is no doubt that petitioners would have been proper although not necessary parties, permission for them to intervene was a matter of discretion with the court. Neither the City nor the respondent taxpayer ever opposed their efforts to intervene. The denial of intervention was simply an exercise of the court's discretion. The court probably wished to avoid the confusion and interference with orderly process which might have resulted if the door was opened to additional parties. If one union and one employee were permitted to intervene what would prevent other unions and other employees ad nauseam from doing likewise? Petitioners were given practically every right of litigants short of being formal parties. There has been no showing of abuse of discretion.

In the case of *Morris Supt.* v. *Insurance Co.*, 6 Ohio St. 2d 185 (1966), the Supreme Court of Ohio reversed the court of appeals for reversing a denial of intervention in the common pleas court to an insurance company stockholder who wished to intervene in a suit against a company in a conservatorship proceeding, even though such intervention was obviously of great financial interest to such stockholder, because no actual prejudice was shown.

The proposed intervenors, not being parties, could not be legally foreclosed by principles of *res judicata*, should they wish to claim some special interest in spite of the de-

cision in the case below. Hence, they could not be legally prejudiced by the decision. Nor were they in fact prejudiced by not being formal parties.

ADDITIONAL REASONS FOR DENYING THE WRIT

THE SAME ISSUES RAISED BY PETITIONERS ARE NOW PENDING IN ANOTHER CASE BROUGHT BY THEM IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

There is now pending in the United States District Court for the Southern District of Ohio, at Cincinnati, in Case No. 7651 on the docket of that court the case of *Cooke, et al.* v. *The City of Cincinnati, et al.*, in which the Petitioner Council #51 and some of its officers have raised the same questions as are attempted to be raised by the Petition for Certiorari in this case. That case is being held in abeyance pending the decision of the Supreme Court of Ohio in the main case below. This is a further reason why this Court should not be called on to exercise jurisdiction in this case at this time.

Even if we ignore the question of mootness and the pending of the same issues in another case in the United States District Court, petitioners have really alleged nothing beyond their attempt to show that the courts below committed error on the motion to intervene. This is not enough to justify this Court's granting a writ of certiorari.

Petitioners still may prevail in the case on the merits now under submission before the Supreme Court of Ohio or in the case which they brought in the United States District Court. Indeed, either of those courts may (we hope not) decide in petitioners' favor, making all aspects of this case entirely moot.

CONCLUSION

It is respectfully submitted that for all the above mentioned reasons Petitioners' application for a writ of certiorari be denied.

Respectfully submitted,

.....

JEROME GOLDMAN
Attorney for Respondent,
Mitchell B. Goldberg